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JUDICIAL NULLIFICATION OF ACTS OF CONGRESS.

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A LAW is a rule which those to whom it is addressed are obliged to observe. Without the obligation, it would be mere admonition. To oblige one to observe a rule is simply to visit him with disagreeable consequences if he should disobey it. This includes investigation into the fact of disobedience, and, disobedience being ascertained, causation of the consequence.

In our political system, one body is set apart to lay down the rules, and other officers are created to enforce them. Since the probability of enforcement is necessary to law, it is evident that a so-called legislature is, in fact, not a legislature unless other officers concerned in administration and execution not only exist, but are purposed, to enforce its enactments. In short, the will of the executive converts the abstract declarations of the legislature into law.

When the Constitution of the United States declares in what way a bill shall become a law, it must mean to state when the wish of the lawmaking body shall become obligatory—that is, when it shall be sympathetically heeded, with purpose to enforce it, by the executive officers. In ordaining that a bill passing both Houses and approved by the President shall become a law, it ordains that it shall then become an obligatory rule of action; that is, that the executive agents of the United States, including the courts, shall enforce it.

Is there any indication that the makers of the Constitution intended that the Executive, in any of its branches, administrative or judicial, should have the right to abort a law by refusing to it the effects whose sequence only gives it the quality of law?

The debates in the Federal Convention are equivocal. It is evident that Gerry, Martin, Mason and Wilson supposed that the courts would be able to consider whether a law was constitutional or not, and, if they decided that it was not, to refuse to enforce it. On the other hand, Mercer, Dickinson and Gouverneur Morris denied to them such a power.

The action of the Convention is more significant than the imperfectly reported sentiments of a few of its members. The attempt was made, and successfully, to unite the Executive with the two Houses of Congress in the making of laws. No bill could become a "law" until submitted to the President, but a thrice-repeated effort to associate with him the Federal judges was decisively defeated. One or two delegates may have opposed their participation in part because they thought the judges could, in the business of execution, annul a law, and for this reason did not need to have it submitted to them at its initiation; but there is no evidence that this view influenced many in rejecting the proposed submission of bills to judges. Such a reason would have been equally good for denying to the President the right of veto. As an executive officer he could, when the occasion for enforcing a statute arose, have considered, like the judge, whether it was constitutional or not, and have refused to execute it if he thought it unconstitutional. A more reasonable interpretation of the acts of the Convention is that the majority did not intend the judges to have any right to elect which of the laws of Congress they would enforce.

That the Conventionists did not intend that the courts should be able to refuse enforcement to acts of Congress, is probably indicated by three striking circumstances. In declaring an act unconstitutional, a court would antagonize Congress to a degree, and might provoke reprisals from that body. The power of impeachment of judges was with Congress, and, as Hamilton concedes in the 83d "Federalist," they might be impeached for declaring acts of Congress unconstitutional. Is it credible that the people who ordained the Constitution intended that the court should have the duty of declaring acts unconstitutional, and yet should be left liable to the vengeance of Congress for so doing? If they had intended to impose on the court so serious a duty, is it not likely that they would have protected the court from assault by the body whose enactments it annulled?

Another significant fact is that the whole appellate power of the Federal judges, and, with the exception of a small number of cases, their whole original jurisdiction, are the creature of Congress. If Congress decides to avoid a decision adverse to its legislation, it needs simply to withhold, or to recall, jurisdiction. A flagrant case of this sort was that of *McCardle*. Arrested for trial before a military commission, he denied the constitutionality of the law and applied to the Circuit Court of the United States by *habeas corpus* for his liberation. This court refusing to liberate him, he appealed to the Supreme Court. A majority of the judges of that court were of opinion that the law was unconstitutional, but deferred pronouncing a decision in order to give Congress time to repeal the statute under which the court had jurisdiction. Congress repealed the act, and thus the court escaped the unpleasant duty of declaring the act of Congress unconstitutional. It is hardly thinkable that the makers of the Constitution, intending that the court should have the power and be under a duty to pronounce acts of Congress void, should have made that power withdrawable by Congress at any time.

A function so important as that of controlling Congress so as to compel it to observe the limitations of the Constitution, would hardly have been deposited with a court which Congress or any branch of it could control. But the Constitution-makers have given this control to Congress. The creation of the courts is with Congress. The definition of their jurisdiction is with it. If the mind of the court is so attuned that it will decide a measure of legislation unconstitutional, all that is necessary to secure a different mind is for Congress to increase the number of judges; so that the President may nominate and the Senate confirm such additional judges as, with the existing favorers of the measure, will constitute a majority of the court. Something like this, it is charged, was done in connection with the *Legal Tender* decisions. Whether it was in fact done or not, it is quite practicable, when the President and both Houses of Congress agree on the constitutionality and the desirability of a given piece of legislation. But is it likely that this power over the court would have been given to Congress and the President, if one of the court's functions requires it to control, and not to be controlled by, Congress and the President?

The Constitution makes careful and detailed provision for

submitting a bill to the President before it shall become a law—that is, before it shall become obligatory on subjects of the Government, and enforceable by executive agents. If the courts are to have the power to void statutes despite their passage through the Houses of Congress and their approval by the President, it is deeply regrettable that provision is not made for the regulation of the exercise of so remarkable a jurisdiction.

Ultimately, the Supreme Court exercises the power. But that court may be composed of three, six, nine, fifteen, twenty-five, fifty judges. The Constitution does not prescribe a number. Would the people have consciously given the court of three the power to annul an act passed by three hundred Senators and Representatives, and by a President? The court has never had more than ten members. It has now only nine. These nine men can quash the legislation of the representatives of ninety millions of people. The time is at hand when they will be able to quash the legislation of the representatives of two hundred millions of people, though that legislation were unanimously enacted and unanimously approved by the people.

Again, there is no definition of a quorum of the court. Small as the entire court is, a yet smaller number of judges may be present when a statute is annulled.

There is no rule as to the proportion of judges who are for to those who are against a decree of nullity of a statute. Acts of Congress have very seldom been pronounced void by a unanimous court. In a majority of cases there have been three or even four dissenters. Often the vote of the court has been cast practically by one judge. Did the makers of the Constitution contemplate this? If they had, would they have ordained that a majority of one in a court of nine should set aside the judgment of the minority of the court, of the two Houses of Congress, of the President who approved the bill, possibly of a practically unanimous people whom Congress represents? Propriety and respect for the judgment of a coordinate branch of the Government imperatively require that the small court which condemns the legislation of a numerous Congress, supported by a numerous people, should be unanimous. Would the wise men of 1787 have omitted to require unanimity, had they intended that a court should have this enormous power?

One of the most important prerequisites to law in a modern

state is that its existence and obligation shall be knowable. The Constitution - framers with much particularity tell us how a "bill" is to become a "law," but they intimate nothing as to the possible classification of "laws" into laws that *are* laws and laws that are *not* laws. Would not experienced statesmen, had they supposed that even after a bill had become a "law" it might not be a law, have invented some device by which people could recognize the law that was valid, or could early procure an enlightening decision from the court, before being involved in liabilities in case of mistaken judgment? A law is published. If it is constitutional, A must refrain from doing something which it would be highly useful for him to do. If it is unconstitutional, A can do this with impunity. He must take the risk of mistake in determining whether the law is valid or not, and the risk may be serious. That the makers of the Constitution were aware of the injustice of rules laid down after the fact is evident from their prohibiting *ex post facto* laws. But when a statute is voided from its enactment, by a decision delivered a year or five years afterwards, the law which it was intended to displace becomes practically *ex post facto* as to acts done between its enactment and the annulling decision. Why was no method invented by which immediately upon the passing of an act, and before hazard from obeying or disobeying it, a judgment of the court could be procured? Would the Constitution-makers have deliberately omitted to furnish it?

Various methods have been suggested by which a decision could be obtained within a comparatively short time. One has been an injunction by the court, pending the deliberation upon a bill in Congress, against its enactment. The suggestion of this method has been scoffingly repudiated. Another has been injunction or mandamus directed to the President, or the legal head of a Department or the Attorney-General, requiring him to refrain from taking steps to cause subordinate officers to execute the law, or commanding them to take steps to prevent the execution of the law. This method, so far as applicable to the President, has been rejected. The court has chosen to recognize, as valid for arresting action under void statutes, only the less comprehensive, prompt and efficient methods.

The makers of the Constitution, had they intended that statutes passed with all constitutional forms, should nevertheless be

capable of being voided by the courts, would probably have devised a plan for procuring as early a decision as possible, so as to disengage the public from fear and embarrassment. The courts have adopted the policy of postponing the decision of the constitutionality of an act to the latest possible moment. Nothing is more improbable than that the makers of the Constitution could have intended that even the decision of the highest court, as to the constitutionality of an act, should not be final, that persons relying upon it might yet be overtaken and involved in disaster by a second decision in a contrary sense. Yet, these inconsistent decisions, this absence of all finality, is a mark of American jurisprudence, as actually developed under the Constitution.

The judges are not selected by the people, nor answerable to the people. Appointed, they hold office practically for life. They are not removable, as are the judges in England and in several of the States, upon the address of both Houses of Congress, even were that address unanimous. This little group of nine men can apply an interpretation to the Constitution which no one outside of the court applies to it, and annul the will of people, Congress and the President, in the name of what they declare to be the will and intention of the dead men of 1787. Could it have been the will and intention of these men, that the opinion of them entertained by these nine should be stronger and more prevalent than that of all the nation besides?

The people who adopted the Constitution directly created Congress, and only indirectly created the court through Congress. The people directly elect the members of the Lower House, and by their State legislatures elect the members of the Upper House. They elect a President nominally through electors, but really directly. This President and the Senate appoint the judges. Could the constituent people have intended the creature of their Congress to be superordinate to Congress? Although Alexander Hamilton, in the 78th "Federalist," denies that a court which can annul an act of Congress is *ipso facto* superior to Congress, it is self-evident that, in so far as law can get enforcement only with the cooperation of a court, if the court exercises the right to say what law it will, and what it will not, enforce, the power of Congress to effect its legislative will depends on the consent of the court, and Congress is *pro tanto* inferior to it.

The people intended the Constitution to be obeyed, the grants no less than the restrictions of it. They attached as much importance to the former as to the latter. If a court had the power to define the restrictions, it would have the power to take away from Congress, by mistake or malevolence, that which the people gave it—that is, it might make the people incapable of doing through the legislators what they intended to be able to do. On the other hand, if Congress has the final judgment as to the power conferred upon it, it may exceed its intended legislative limits. Which of these possible evils is the larger? That of defeating the people's will by incapacitating them through Congress to legislate, or that of defeating it by making a wider legislation possible than was designed? Is it clear that the constituent people thought the former less objectionable than the latter? Where is the evidence? But to concede the power of the court to annul statutes is to incur the risk of the former.

Did the constituent people think that a body of six or nine would understand their Constitution better than their immediate elect, the House, and their mediate elect, the Senate, and the President? Did they think the intelligence to know their will as expressed in that instrument, would be more acute in six or nine than in two hundred or three hundred?

The court would be composed exclusively of members of one profession, all with similar mental habits, proclivities and ideals. Did the people think that these lawyers would understand their intention better than educated physicians, teachers, financiers, merchants, manufacturers, farmers, or their delegates in Congress? Did they intend to put in the hands of nine lawyers the power to paralyze legislation, thus bestowing on one profession a primacy quite unique in the world?

If a Congress and President enact what, in the judgment of the people, is an unconstitutional law, the people can correct the error, by agitating for a repeal, or by electing a new Congress pledged to repeal. But, if a constitutional law is annulled by a court as unconstitutional, the remedy is not so apparent and simple. Must the people acquiesce? Shall they agitate for a change of the court's decision? Shall they insist on an enlargement of the court, in order to "swamp" the judges who have pronounced the undesirable judgment? Shall the judges be impeached, removed and others substituted?

It is difficult to believe that the people took so humble a view of themselves, that they consciously abdicated, for themselves and their successors in all time, and for those of their officers whose appointment they could control, the right to interpret the Constitution, and vested it in a small body of one small profession, appointed for life, giving to this body the power to declare void legislation, though enacted by a unanimous Congress in response to the unanimous demand of the people.

If a President or the Congress may usurp power, so may a court. The President and Congress are responsible to the people. The court is practically responsible to nobody. Conviction on impeachment is very difficult; and, admitting the constitutional right of the court to pronounce acts of Congress void, conviction on impeachment for exercising this power would be iniquitous. The risk of possible and irremediable usurpation by a court is as great as of that by Congress. There is no trace in the work of the Constitution-makers of an intention to make a court a censor of the work of Congress, while furnishing no censor for the acts of the court. Hardly extravagant is the language of President Lincoln, in his first inaugural, that, when we recognize the sole power of the court to define the limits of constitutional executive or legislative action, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands" of the Supreme Court.

Even Hamilton realized the inadmissibility of the doctrine that the court is the final judge of the boundaries of the respective powers of the Governmental departments, for, in the 49th "Federalist," he announces that encroachments by one department upon another are to be redressed by "an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance." But how do the people declare the meaning of the Constitution except through those whom they elect, the President and the Congress? There is no other way by which the people could declare their sense of the true meaning of the existing Constitution.

If legislation were the only evil, the dangers arising from the voiding of laws by a court would be tolerable. Experience, however, shows that most evils spring up apart from government, and that the function which vindicates the existence of government is that of curtailing and repressing them. Making impos-

sible this repression by narrow, sectarian, professionally biased, or class-biased views of the Constitution, applied in the annulment of statutes, is a great and unendurable prejudice to the public weal.

The power authoritatively to interpret the Constitution is virtually the power to make it. Practically, so far as many of the functions of government are concerned, the Constitution is made for us, from time to time, by the nine lawyers who are judges of the Supreme Court. They make it, while, like the Roman haruspices, they think, as do others, that they are only divining the intention of the Numen, the dead men of 1787.

W. TRICKETT.